

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR
Second Appeal No. 148/2006

Notes, Office Memoranda of

Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's
Orders.

CORAM : A.P. Lavande, J
DATE : 20.4.2007

Heard Shri P.R. Puri, learned counsel for the appellants and Shri P.N. Kendurkar, learned counsel for the respondents.

2. This second appeal is directed against the Judgment and decree dated 19th December, 2005 passed by the 9th Ad hoc Additional District Judge, Nagpur in Regular Civil Appeal No. 475/04 allowing the appeal against the Judgment and Decree dated 31.7.2004 passed by the 3rd Joint Civil Judge, Jr. Dn. in Regular Civil Suit No. 654/01.

3. The facts leading to filing of this appeal are as under:

Late Shivshankar Jaiswal was the owner of the house property no. 936 situated in Cotton Market, Nagpur. In or about 1963 he inducted one Keshavlal Jain as tenant in the suit premises. Since Keshavlal had sub let the portion of the damaged premises to Ishwar Korga Pujari the father and husband of the appellants respectively and one Kalyan Navi,

Lala Shivshankar initiated Rent Control Proceedings against Keshavlal Jain in which Ishwar Pujari and Kalyan Navi were joined as respondents. After seeking permission from the Rent Controllor to terminate the tenancy, Shivshankar sought permission to terminate the tenancy of Keshavlal which was granted against which Ishwar Pujari filed an appeal before the appellate court which was dismissed. Thereafter, in January, 1974 Shivshankar filed Regular Civil Suit No. 198/74, inter alia, for ejectment, possession against the tenants and sub tenants which was decreed in the year 1975. In October, 1976 Lala Shivshankar filed Regular Darkhast Application No. 658/76. In the year 1977 warrant of possession was issued for delivery of possession. Objecting to the delivery of possession Ishwar Pujari filed Civil Suit No. 1310/1977 against Lala Shivshankar seeking declaration of the ownership of the property. The said suit stood abated. Thereafter, the present appellants filed the Regular Civil Suit No. 776/79 against Lala Shivshankar for declaration of tenancy. Since the warrant of possession was not executed in August 1983 Late Lala Shivshankar took steps for execution of the warrant of possession. However, on 18.11.1983 Lala Shivshankar expired. The present respondents filed application for bringing them on record as legal representatives of late Lala Shivshankar which was allowed. In July, 1985 the present appellants raised objection in execution proceedings on the basis of the Slum Act. In September, 1985, application was filed by the present

appellants in the said execution proceedings for amendment in which reference was made for the first time to agreement dated 1.9.1981 entered into between both the appellants and late Lala Shivshankar in respect of the suit property. On 7.3.1986 in the said proceedings photo copy of the agreement was produced on record. On 14.2.1986 the present appellants filed Regular Civil Suit No. 89/1986 for specific performance of contract against the respondents who are legal representatives of late Lala Shivshankar. According to the plaintiffs/appellants Late Lala Shivshankar had entered into an agreement of sale of the suit property for total consideration of Rs. 92,000/- and the plaintiffs had paid an amount of Rs. 20,000/- by way of earnest money and time was fixed till 31.1.1985 for payment of the balance consideration. It was further the case of the plaintiff that till life time of late Lala Shivshankar the plaintiff had paid total consideration of Rs. 72,000/- towards the part payment of entire consideration. The suit was contested by the defendants-respondents herein. The trial Court upon appreciation of the evidence led by the parties held that the plaintiffs had proved execution of the agreement on the basis of which the suit was filed and consequentially decreed the suit for specific performance. The appeal preferred by the defendants-respondents was allowed by the lower appellate court holding that the execution of the agreement by late Lala Shivshankar could not be believed for very many reasons.

Mr. Puri, the learned counsel appearing for the appellants submitted that the findings given by the lower appellate Court while holding that no agreement was entered into between the plaintiffs and late Lala Shivshankar are contrary to the evidence on record and as such perverse. He further submitted that the lower appellate Court has erred in relying upon the evidence of the expert who has deposed that the signatures on the alleged agreement of sale and so called receipts issued by late Lala Shivshankar do not tally, in the absence of any corroborative evidence. He further submitted that the execution of the agreement and the receipts were duly proved through evidence of plaintiff no.1 and Jainarayan (P.W.2) who according to the plaintiffs was present at the time of execution of the agreement. He further urged that the trial Court having appreciated the evidence in the right perspective the lower appellate Court has erred in reversing the findings given by the trial Court without any cogent reasons in support of its findings. Mr. Puri, further urged that the reasons given by the lower appellate court for holding that the agreement dated 1.9.1981 was not proved are without any basis and as such decree passed by the lower appellate Court deserves to be quashed and set aside.

Per contra, Shri Kendurkar, learned counsel appearing for the respondents/defendants invited my attention to the Judgment passed by the lower appellate

Court and submitted that the reasons given by the lower appellate Court for setting aside the decree passed by the lower appellate court are well founded and, therefore, findings given by the lower appellate court cannot be termed as perverse to warrant interference in exercise of the jurisdiction under Section 100 of the Code of Civil Procedure. The learned counsel further contended that having regard to the admitted position that there was litigation between the plaintiffs and late Ishar Pujari during his life time which continued till the year 1985 it is difficult to believe that late Lala Shivshankar would enter into an agreement for sale of the suit property with them in the year 1981. He further urged that the fact that the appellants relied upon the alleged agreement of sale dated 1.9.1981 for the first time in September 1985 in spite of the pendency of the proceedings between the parties is clinching circumstance which goes to show that the alleged agreement is not genuine. He lastly urged that the findings given by the lower appellate Court are borne out from the evidence on record and as such cannot be said to be perverse and, therefore, no interference is called in this appeal.

I have considered the submissions made by the learned counsel for the parties and perused the records. The learned Appellate Court has held that it is difficult to accept the case of the plaintiffs that late Lala Shivshankar had

executed the alleged agreement of sale dated 1.9.1981 in view of the following circumstances.

i) There was litigation between late Lala Shivshankar on one side and the present appellants and Ishwar Pujari on the other side from the year 1970 and in all the proceedings late Lala Shivshankar had succeeded;

ii) The statement made in the agreement dated 1.9.1981 that the appellants were tenants of late Lala Shivshankar is not borne out from the evidence on record. On the contrary, regular Civil Suit No. 776/1979 filed by the present appellants against late Lala Shivshankar for declaration of tenancy was dismissed on 18.2.1982 i.e. after the date of the alleged agreement of sale.

iii) The appellants had not made any reference to the alleged agreement of sale till they filed their reply on 18.7.1985 in Regular Darkhast No. 658/76 which clearly creates doubt about genuineness of agreement.

iv) It was on 7.3.1986 that for the first time the copy of the agreement was produced by the appellants in the execution proceeding.

v) Even after execution of the alleged agreement of sale, Late Lala persuaded the Regular

Darkhast No. 658/76 till his death which occurred on 18.11.1983.

vi) There was a glaring inconsistency in the testimony of the plaintiff no.1-(P.W.1) who examined himself and P.W.2 Narayan Pathak who claimed to be the witness to the alleged agreement.

vii) The evidence of the hand writing expert Ulhas Athale who deposed that the signatures of late Lala Shivshankar on the agreement and the receipts did not tally with his admitted signatures.

Having carefully analysing the Judgments given by the lower appellate Court I find that the reasons given by the lower appellate Court for holding that the plaintiffs had not proved the agreement of sale cannot be said to be perverse. On the contrary, in my opinion, the lower appellate court has correctly appreciated the evidence led by the parties and has come to the conclusion that the plaintiffs have not proved the alleged agreement of sale purported to have been executed by Lala Shivshankar. One clear clinching circumstance which goes against the appellants-plaintiffs is that notwithstanding the pendency of the proceedings between the parties till the death of Late Lala Shivshankar on 18.11.1983 the plaintiffs neither relied upon nor produced the copy of the agreement. If said

agreement was really in existence it was expected of the plaintiffs to produce the same at the earliest in order to satisfy the executing court that the decree passed could not have been executed in view of the agreement of sale entered into between the parties. The conduct of the plaintiffs in not relying upon or producing the copy of the alleged agreement till the death of Late Lala Shivshankar is a clinching circumstance which creates serious doubt about genuineness of the documents. It is expected of the party who is in possession of the document which would culminate the proceedings against him to produce the same at the earliest opportunity. In the present case admittedly till September 1985 the plaintiffs chose not to rely upon the agreement. It is difficult to accept the submissions of Mr. Puri that since the plaintiffs had time till 31.12.1985 to pay balance consideration, the plaintiffs chose not to produce the documents in the proceedings between the parties. The said agreement if really was in existence would have been produced by the plaintiffs resulting in culmination of the proceedings against them. Therefore, in my opinion, the finding of the lower appellate Court that the plaintiffs had not proved the agreement dtd. 1.9.1981 cannot be faulted. The submissions of Mr. Puri that there was no evidence to corroborate the evidence of the hand writing expert Mr. Athale has no merit. Several circumstances to which I have already made reference above, lend support to the evidence of the expert. Needless to mention that in a trial,

the Court is not only entitled to rely upon oral and documentary evidence but also entitled to draw legitimate inferences from admitted or proved facts. In the present case, the circumstances to which I have already made reference are so clinching that the finding of the lower appellate court that the agreement appears to be totally suspicious and not to have been executed by late Lala Shivshankar cannot be termed as perverse. The evidence led by the parties has to be appreciated upon the touch stone of probabilities and applying this test I am satisfied that the trial court was absolutely wrong in holding that the plaintiffs had proved the agreement, relying upon the evidence of the plaintiff no.1 and P.W. 2 Jaynarayan who was examined to prove the alleged agreement entered between the parties. The circumstances mentioned by the lower appellate Court which have been mentioned in the impugned Judgment are such that they completely outweigh evidence led by the plaintiff no.1 and his witness Jaynarayan and, therefore, the lower appellate court was absolutely justified in disbelieving the plaintiff no.1 and his witness Jaynarayan Pathak. It is very easy for a party to step in the box and to depose about execution of the agreement by the person who is dead and examine witness in support of the said fact which at times is difficult to dislodge.

Upon careful perusal of the Judgments passed by both the lower courts, the Judgment given by the appellate

Court cannot be faulted. No interference is called for in the present appeal. In any case, no substantial question of law is involved in the present appeal. Hence, the appeal is dismissed.

C.A. No. 1927/06:

In view of the dismissal of second appeal, nothing survives in this application. Hence, the same is dismissed as infructuous.

Judge

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